No. 89-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

In Re Application of NEWSDAY, INC.

CHARLES F. GARDNER,

Petitioner,

—vs.—

NEWSDAY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:

PAUL S. GROBMAN
CHRISTOPHER J. NOLAN
TOWNLEY & UPDIKE
405 Lexington Avenue
New York, New York 10174
(212) 973-6000

PHILIP E. KUCERA
NANCY E. RICHMAN
Times Mirror Company
780 Third Avenue
New York, New York 10017
(212) 418-9600

ROBERT LLOYD RASKOPF
TOWNLEY & UPDIKE
405 Lexington Avenue
New York, New York 10174
(212) 973-6000

Counsel of Record

QUESTIONS PRESENTED

I. Was the Second Circuit correct in holding that the district court did not abuse its discretion in releasing a thirteen-month old redacted search warrant affidavit to the public, where its release did not compromise an ongoing government investigation, where much of the information in the affidavit had previously been publicly disclosed, where the subject of the affidavit, petitioner herein, pled guilty to criminal charges stemming from the subject matter of the affidavit and where, in fashioning the order, the district court expressly balanced privacy interests in non-disclosure against the public interest in disclosure?

II. Should Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.* ("Title III"), a statute enacted prior to decisions of this Court clearly establishing both a common law and a constitutional right of access to records used in criminal proceedings, be interpreted to bar absolutely public disclosure of search warrant affidavits containing Title III-derived information, so as to remove completely from the district court the discretion to balance privacy interests in non-disclosure against the public interest in disclosure of the affidavits?

STATEMENT PURSUANT TO RULE 29.1 OF THE UNITED STATES SUPREME COURT

Petitioner Newsday, Inc. is a wholly-owned subsidiary of Times Mirror Company. Times Mirror Company owns a number of other corporations engaged in publishing and related activities in the United States which have no relationship with Newsday, Inc. other than this common ownership. Newsday, Inc. will provide a list of such entities, if requested.

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Respondent Newsday, Inc. ("Newsday") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Second Circuit entered January 29, 1990.

STATEMENT OF THE CASE

On March 9, 1989, petitioner Charles Gardner, a former employee of Unisys Corporation ("Unisys") and a central figure in the government's investigation into allegations of corruption and bribery in the defense contracting industry

now commonly known as "Operation Ill-Wind," pled guilty to a three-count criminal information publicly filed in the United States District Court for the Eastern District of Virginia. In his plea agreement, which was also publicly filed, Gardner admitted: (1) that he caused the creation of companies for the purpose of receiving monies from Unisys to be used to influence the award of military contracts through bribery and illegal campaign contributions; (2) that one of those companies purchased the Idaho condominium of Melvyn R. Paisley, then Assistant Secretary of the Navy, Research, Engineering and Systems, for a price vastly in excess of what Gardner knew to be its value; (3) that he caused Unisys to make illegal contributions to the campaigns of United States Congressmen Ron Dyson and Bill Chappell by disguising them as contributions made by individuals unrelated to Unisys; and (4) that he agreed to provide a company with bogus invoices to substantiate deductions taken on its corporate income tax return for services allegedly provided to Unisys.[1] Petitioner was subsequently sentenced to thirty-two months in prison and fined $40,000.

The issues upon which petitioner requests this Court's review arose from the June 14, 1988 search of his residence in connection with the "Operation Ill-Wind" investigation. The search warrant, supporting affidavit and inventory were filed—under seal—in the United States District Court for the Eastern District of New York. Despite repeated applications by Newsday for access to the search warrant materials and the undisputed public interest in the investigation, Judge Edward R. Korman kept the search warrant materials under

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1 On July 14, 1989, Dennis Mitchell, another subject of the search warrant affidavit at issue, pled guilty to a two-count criminal information publicly filed in the United States District Court for the Eastern District of Virginia. Mr. Mitchell admitted to causing Unisys to make illegal contributions to the campaign committees of United States Congressmen Les Aspin, Robert Roe and former Congressman Robert E. Badham by disguising them as individual contributions. Mr. Mitchell joined petitioner in objecting in the district court to disclosure of the search warrant affidavit at issue but did not appeal from the district court's decision ordering disclosure.

seal for some thirteen months,[2] deferring to the privacy interests of yet unindicted persons mentioned in the affidavit—including petitioner—and the government's request for secrecy while its investigation continued.

Finally, on July 27, 1989, more than one year after the government's execution of the search warrant, one-half year after the affidavits containing wiretapped conversations involving petitioner had been released in other jurisdictions[3] and five months after petitioner had pled guilty, Judge Korman ordered the release of the search warrant materials in redacted form. Concluding that access to search warrant materials "is important to the public's understanding of the function and operation of . . . the criminal justice system and may operate as a curb on prosecutorial and judicial misconduct," Judge Korman held that the public had a First Amendment right of access to the affidavit supporting the issuance of the search warrant for petitioner's home. Petitioner's Appendix (hereinafter "App.") B, p. 14a. Moreover, Judge Korman found that Title III does not prohibit the release of probable cause affidavits merely because such affidavits are based in part on information obtained through intercepted communications. App. B, p. 16a.

As for the subjects of the search warrant, Judge Korman found that petitioner and Mr. Mitchell, by pleading guilty and admitting to the crimes for which they were charged, had diminished privacy interests in the intercepted conversations

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2 On July 15, 1988, Judge Korman ordered the release of the search warrant and attachments relating to the search of petitioner's residence, as well as a few introductory paragraphs of the affidavit supporting the issuance of the search warrant.

3 On December 27, 1988, the United States District Court for the Eastern District of Maryland unsealed substantial portions of search warrant affidavits containing wiretapped conversations between petitioner and other subjects of "Operation Ill-Wind." These affidavits charged, among other things, that petitioner and others sought to corruptly influence Congressional legislation on defense programs and obtained Defense Department assistance in an attempt to procure a lucrative contract for Unisys.

contained in the search warrant affidavit. Judge Korman stated:

> At best, taken in the light most favorable to Gardner and Mitchell, they are mundane business conversations. They don't involve trade secrets, for example, or other kind of privileged business communications.
>
> Of course, at worst, they constitute evidence of criminal activity.
>
> To the extent that they constitute evidence of criminal activity, it seems to me, it is hard to say that there is a legitimate privacy interest in those conversations. For engaging in conversations that are in furtherance of criminal activity, people can be prosecuted. It seems to me to be stretching it a bit to say that there is a privacy interest in those kinds of conversations.

App. B, p. 17a. On the other hand, Judge Korman found that other as yet unindicted individuals and corporations did have continuing privacy interests, and ordered that the names of those individuals and corporations be deleted from paragraphs in which they were charged with criminal activity. App. B, pp. 18a-19a. Judge Korman also ordered deletion of the names of "peripheral characters" who were parties to isolated intercepted communications, "as to whose complicity [there is] some doubt." App. B, p. 20a.

The Second Circuit affirmed Judge Korman's decision, finding it unnecessary to reach the First Amendment issue. Citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), the Second Circuit held that the search warrant affidavit, required to be filed with the clerk of the issuing court by FED. R. CRIM. P. 41(g), is a judicial record subject to a common law right of access once the warrant is filed. App. A, pp. 8a-11a.[4]

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4 FED. R. CRIM. P. 41(g) is silent as to the time by which papers relating to the search warrant must be filed with the clerk. The Second Cir-

Turning to the interests opposing access, the Second Circuit found that Title III cannot be interpreted—despite petitioner's assertions to the contrary—to *absolutely* restrict the permissible means of public disclosure of wiretap information to situations in which that information is disclosed through live testimony in court. App. A, p. 8a. That Title III does not absolutely forbid public access to the search warrant affidavit, the Second Circuit continued, does not, however, mean that important privacy rights are not potentially implicated when a court contemplates disclosure of a document containing Title III information. *Id.* Indeed, the Second Circuit, quoting *Matter of New York Times*, 828 F.2d 110, 116 (2d Cir. 1987), *cert. denied*, 485 U.S. 977 (1988), stated that the privacy interests of defendants "that may be harmed by disclosure should weigh heavily in a court's balancing equation," and recognized that a district court balancing the public's right of access against an individual's Title III privacy interests retained the authority under appropriate circumstances "to redact a document to the point of rendering it meaningless, or not to release it at all . . . ." App. A, p. 12a (footnote omitted).

In the present case, however, the Second Circuit held that the balance struck by Judge Korman was well within his discretion. The Second Circuit concluded:

> The record shows that the district court was aware of the privacy interests at stake, and redacted references to innocent third parties. Gardner was provided with a copy of the intercepted communi-

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cuit chose not to delineate a general time period by which such papers must be filed—and thus the point at which a common law right of access attaches—and instead defined that point in terms largely specific to the facts of this case:

> Here, the warrant has been executed, a plea-bargain agreement has been reached, the government admits that its need for secrecy is over, and the time has arrived for filing the application with the clerk.

App. A, p. 10a.

> cations, and had ample time to formulate specific objections to disclosure. Considering the facts of this case and the nature of the intercepted communications, we find that the district court did not abuse its discretion.

App. A, p. 12a (footnote omitted).

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner asks this Court to review the Second Circuit's decision, arguing that Congress in enacting Title III in 1968 expressly balanced the then *unidentified* public right of access against individual interests in privacy, that the privacy interests implicated by Title III are immutable and absolute, and therefore that:

> [T]he Second Circuit's approval of a scheme whereby each district judge may conduct his or her own balancing of the public's right of access against an individual's privacy rights in a particular case usurps the proper role of Congress which has already conducted this balance and enacted Title III as a result.

Petition For Cert., p. 10. Since petitioner asserts that Congress has already accomplished the balancing necessary where Title III information is involved, what petitioner argues for in effect is a *per se* rule prohibiting any judicial weighing of interests favoring or opposing disclosure when access is sought to documents or proceedings which include information derived from wiretaps.

Petitioner cites to decisions from other Circuits which he claims support this position and which are allegedly in direct conflict with the Second Circuit's conclusion that (a) a right of access applies to search warrant affidavits at the point at which Judge Korman ordered disclosure, and (b) that the right of access, when balanced in this case against opposing interests in access, was not overcome by petitioner's interest

in privacy. In Point I, Newsday will establish that the cases relied upon by petitioner, far from being in conflict with the Second Circuit's decision, are indeed fully consistent with and supportive of the rulings below. In Point II, Newsday will show that the decision of the Second Circuit affirming Judge Korman's unsealing of the search warrant affidavit, five months after petitioner pled guilty, fully comported with access decisions rendered by this Court and that the balance struck between individual privacy rights and the right of public access by Judge Korman and the Second Circuit was wholly proper in all respects.

I. There Is No Conflict Between The Second Circuit's Decision And Decisions From Other Circuits Relied Upon By Petitioner

a. The Second Circuit's Recognition Of A Right Of Access To The Search Warrant Affidavit

There is no conflict between the search warrant affidavit decisions in other Circuits and the Second Circuit's decision below. All but one of these decisions expressly agrees with the Second Circuit that there is a right of access to search warrant affidavits and the lone exception expressly limits its holding to the pre-indictment phase of the criminal process and strongly suggests that it would hold otherwise at a later stage of the process such as the stage at which petitioner now finds himself. What emerges is not a "cacophony of varied holdings," as petitioner suggests, Petition For Cert., p. 15, but rather a sequence of logically consistent decisions balancing the interests favoring and opposing access to search warrant affidavits at various stages of the criminal judicial process.

As petitioner acknowledges, even at the pre-indictment stage, two Circuits have recognized either a common law or First Amendment right of access to search warrant affidavits. *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64-65 (4th Cir. 1989) (common law right of access); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573

(8th Cir. 1988) (First Amendment right of access). Nor can petitioner convincingly assert that *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989), presents a conflict with the Second Circuit's holding. While the Ninth Circuit refused to find a right of access to search warrant affidavits *before* an investigation is terminated *or* an indictment returned, the Ninth Circuit repeatedly stressed that its holding was a narrow one, and not intended to be extended to a situation, like here, where an investigation has been concluded and an indictment and conviction obtained. *Id.* at 1211, 1214, 1218 n.11, 1221. Indeed, the Ninth Circuit acknowledged that public access to search warrant affidavits would "have some positive effect," and stated that:

> [T]here must be some process by which society can monitor law enforcement officials' decisions to search or seize property beyond relying on the judgment of the neutral detached magistrate . . . [W]e acknowledge that the public has a vital role to play in policing the government's use of the warrant process . . . .

Id. at 1218 n. 11. In the effort to pose a conflict, petitioner has extended the Ninth Circuit's narrow holding in a direction the court was expressly unwilling to go.[5]

In sum, there is no conflict in the Circuits on the question of a right of access in the specific situation that the Second Circuit was faced with: where the subject has pled guilty to criminal charges.

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5 Petitioner also asserts that the Second Circuit, in conflict with *Times Mirror Co.* and *United States v. Woods*, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), found that FED. R. CRIM. P. 41(g) created a public right of access to search warrant affidavits. Petition For Cert., p. 13. The Second Circuit, however, arrived at no such conclusion, grounding its decision on the common law right of access to judicial records articulated by this Court in *Nixon v. Warner Communications*, *supra*, and not on FED. R. CRIM. P. 41(g). As the Second Circuit indicated, FED. R. CRIM. P. 41(g) merely facilitates observance of the common law right by requiring search warrant affidavits to be filed with the clerk of the court.

b. The Second Circuit's Conclusion That Title III Does Not Prohibit Public Access To The Search Warrant Affidavit

Petitioner attempts to fashion another conflict by asserting that the Second Circuit's treatment of the protections against public disclosure afforded by Title III differs from the Eighth Circuit's treatment of the same issue in *Certain Interested Individuals, John Does I-V, who are Employees of McDonnell Douglas Corp. v. Pulitzer Publishing Co.*, 895 F.2d 460 (8th Cir. 1990). Petition For Cert., pp. 12-13. As did the Second Circuit, however, the Eighth Circuit concluded that Title III did not act as an absolute bar to the release of a search warrant affidavit containing wiretap information and, after recognizing a right of access, stated that "what is required is a careful balancing of the public's interest in access against the individual's privacy interests . . . ." *Id.* at 466.

After undertaking that balancing process, the Eighth Circuit concluded that the right of access was outweighed by the individual privacy rights in the case before it because the subjects of the warrants *had not yet been indicted*. *Id.* at 466-467. Finding this fact "critical" to its determination, the Eighth Circuit stated that where there has been no indictment, disclosure of the search warrant affidavits could seriously damage the subjects' reputations and careers without providing them a "judicial forum in which they may potentially vindicate themselves or their conduct." *Id.*[6] The Eighth Circuit concluded that its opinion "in no way restricts" the media from seeking disclosure of the search warrant affidavits after indictment. Clearly then, the Eighth Circuit's holding that Title III privacy interests implicated *prior to indictment* required continued sealing of the search warrant

6 In *Times Mirror Co.*, another case petitioner finds in conflict with the Second Circuit's holding, the Ninth Circuit similarly indicated that privacy interests which warrant restrictions on access to a search warrant affidavit *prior* to indictment may not apply *after* an indictment has been returned, as the subject of the affidavit will then have an opportunity to prove his innocence at trial. 873 F.2d at 1216.

affidavit does not in any way conflict with the Second Circuit's decision concerning petitioner, a convicted felon.[7]

Petitioner also cites to *United States v. Dorfman*, 690 F.2d 1230 (7th Cir. 1982), interpreting that decision conveniently in order to create the illusion of a conflict between the Seventh Circuit and the Second Circuit's decision. At issue in *Dorfman*, after all, was a right of access to raw recordings of intercepted communications *prior* to the return of a verdict. The Seventh Circuit did not consider either of the issues critical to the decision in this case—the right of access to search warrant affidavits containing Title III information and the continuing vitality of Title III's restrictions after the subject of the court authorized wiretap has pled guilty.

In sum, petitioner has not pointed to a single case whose holding or reasoning presents a legitimate conflict with the Second Circuit's decision. Those Circuits which have denied access to search warrant affidavits have done so in the context of a continuing pre-indictment investigation and have stated that the preliminary stage of the prosecution is the critical factor in their determination. Thus, by expressly so limiting their holdings, these Circuits have indicated an openness to, if not a tacit agreement with, the post-conviction balancing applied by Judge Korman and the Second Circuit.

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7 Petitioner also asserts that the Second Circuit's opinion "directly conflicts" with *Certain Interested Individuals* in concluding that a "common law right of access can outweigh an individual's constitutional and Title III conversational privacy interests." Petition For Cert., p. 17. This argument is disingenuous, first, because the Eighth Circuit did not address the common law right of access much less consider whether such a right can outweigh Title III privacy interests and, second, because it is clear from its reasoning that the Eighth Circuit would find both a constitutional right of access to the search warrant affidavit and a diminished Title III interest in privacy in the case of a subject such as petitioner, and would almost surely release search warrant affidavits in like cases.

II. The Balance Struck By The Courts Below Between The Public's Right Of Access And Petitioner's Privacy Interests Was Appropriate Under The Circumstances Of This Case

As mentioned earlier, it was not until five months after petitioner pled guilty and after two previous motions by Newsday that Judge Korman finally ordered the release of the redacted search warrant affidavit. He did this by carefully evaluating the competing interests presented, recognizing that no single interest was absolute:

> To say that there is a qualified First Amendment right of access doesn't mean that everything has to be disclosed. I think there are, in the abstract, in any event, significant privacy interests at stake any time one deals with a disclosure of information that's obtained as a result of the wiretap order.
>
> However . . . it cannot be that every conversation overheard has to be kept under seal. One has to make some judgment as to what conversations can be released without an unwarranted invasion of privacy and what can't.

App. B, pp. 16a-17a (footnote omitted).

At its core, this case is about the exercise of a district court's discretion to evaluate clearly identified competing rights, to weigh which of the competing rights are more strongly implicated by the facts, and to rule accordingly. The Second Circuit's affirmance is based expressly on the ground that under the facts presented, "the district court did not abuse its discretion." App. A, p. 12a. A review by this Court of the exercise of Judge Korman's discretion, upheld by the Second Circuit, is especially unnecessary here where the interests favoring disclosure weighed by Judge Korman are well-established.

It seems clear that a public right of access must apply to search warrant affidavits at some point in a criminal prosecution, certainly by the time of indictment and plea, and peti-

tioner does not meaningfully argue otherwise.[8] *Nixon v. Warner Communications, supra* (common law right of access to judicial records); *Certain Interested Individuals*, 895 F.2d at 462 (First Amendment right of access to search warrant affidavits); *Baltimore Sun Co.*, 886 F.2d at 64-65 (common law right of access to search warrant affidavits); *Matter of Search Warrants Issued on June 11, 1988 for the Premises of Three Buildings at Unysis, Inc.*, 710 F.Supp. 701, 704 (D. Minn. 1989) (First Amendment right of access); *Newspapers of New England Inc. v. Ware Clerk-Magistrate*, 16 Med. L. Rptr. (BNA) 1457, 1459 (Mass. S.J.C. 1988) (common law right of access).

In an effort to shed the problem created for him by settled access jurisprudence, petitioner argues that in Title III, *Congress* already balanced the public's right of access against the privacy interests of the subject of the wiretap--interests which petitioner claims are constitutional in stature and immutable and absolute in their preclusive effect—and determined the sole method through which information derived from wiretaps can be publicly disclosed: live testimony in court. Petition For Cert., p. 10. Thus, petitioner argues, access is forever prohibited to judicial records like the search warrant affidavit at issue where the subject of the warrant has admitted his guilt prior to trial (foreclosing, of course, the live testimony petitioner asserts is necessary before access may be allowed). According to petitioner, the courts have no discretion: they are bound to adhere to Congress' determina-

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8 Indeed, the public interest in access is especially pronounced where, as here, the subjects of the search warrant have pled guilty and thus have forgone their opportunity to challenge the propriety of the warrant or search. Access to the probable cause affidavit in plea cases, which constitute a significant percentage of actual convictions, thus provides the only method by which the public can monitor and police the government's use of the warrant process. *Gannett Co. v. DePasquale*, 443 U.S. 368, 434-36 (1979) (Blackmun, J., concurring in part and dissenting in part) (access to suppression hearing important because it often provides the only opportunity to scrutinize police and prosecutorial conduct); *Matter of New York Times*, 828 F.2d at 114 (access to sealed written documents particularly important in the absence of a hearing).

tion and may under no circumstances engage in a balancing process.

Petitioner's argument, however, unsupported by even a single case on point, rests on several faulty premises. First, as the Second Circuit indicated, since neither a common law nor a constitutional right of access had been explicitly identified much less delimited as of the time Title III was enacted in 1968, Congress would have had great difficulty in balancing then *unidentified* rights against the individual's right to privacy. Petitioner simply has not demonstrated that Congress even considered the public's right of access much less "carefully balanced" that right before enacting Title III.[9]

Second, even if the right of privacy protected by Title III is viewed as constitutional in stature,[10] that theoretical right, like the First Amendment right of access, is not absolute, and thus would require the very balancing process undertaken below. *Globe Newspaper Co. v. Superior Court For Norfolk County*, 457 U.S. 596, 606 (1982); *Certain Interested Individ-*

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9 Similarly, petitioner has not shown that Congress even considered much less intended that Title III's restrictions were to apply *ad infinitum*, even after the subject of the wiretap pled guilty to crimes which were the basis of the investigation from which the wiretap arose.

10 This Court has never recognized a Fourth Amendment right of privacy which prohibits the *disclosure*—as distinguished from the *admission*—of evidence seized by the government, even where—unlike here—that evidence is subsequently found to have been illegally obtained. Indeed, as this Court expressly stated in *Katz v. United States*, the case upon which petitioner premises his claim of a constitutional right to nondisclosure:

> [T]he Fourth Amendment cannot be translated into a general constitutional 'right of privacy'. That Amendment protects individual privacy against certain types of governmental intrusion. . . . [T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is . . . left largely to the law of the individual States.

389 U.S. 347, 350-351 (1967) (original emphasis).

uals, 895 F.2d at 466.[11] As this Court has recognized, even the obviously sympathetic purpose of protecting the privacy of minor rape victims does not justify a *mandatory* restriction on access in every case, for "*the circumstances of the particular case may affect the significance of the interest.*" *Globe Newspaper*, 457 U.S. at 608 (emphasis added). Surely, a convicted felon is no more entitled to a *per se* prohibition on access to evidence of his crimes, evidence which in part has already been disclosed, than is a minor victim of sexual abuse to testimony relating to his alleged victimization. Under either circumstance, a case-by-case judicial balancing of opposing interests will adequately protect an individual's "legitimate privacy interests" without sacrificing the countervailing public need for openness at a certain point in the criminal process. *Press Enterprise Co. v. Superior Court of California Riverside County*, 464 U.S. 501, 512 (1984); *Globe Newspaper*, 457 U.S. at 607-611.

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11 Petitioner's contention that a common law right of access can *never* be balanced against Title III interests in privacy is unsupported. It is also belied by later proceedings in *United States v. Dorfman*, a case upon which petitioner places considerable reliance elsewhere. Finding a common law right of access to exhibits containing communications intercepted pursuant to Title III, the Seventh Circuit held that access should be denied "only where actual, as opposed to hypothetical, factors demonstrate that justice so requires," and citing *Nixon v. Warner Communications*, concluded that the outcome should be left to the "sound discretion of the trial court." 8 Med. L. Rptr. (BNA) 2372, 2373 (7th Cir. 1982); *See also United States v. Rosenthal*, 763 F.2d 1291, 1294-1295 (11th Cir. 1985) (court must balance common law right of access to wiretap communications against interests favoring closure).

Moreover, this Court has regularly found that the *constitutional* right of access must be balanced against opposing interests in closure irrespective of whether or not those opposing interests are constitutional in origin. *See, e.g., Globe Newspaper*, 457 U.S. at 607-611 (balancing First Amendment right of access against privacy interest of sexual assault victim and government interest in encouraging such victims to come forward and testify); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 600 n.5 (1980) (Stewart, J., concurring) (non-constitutional considerations, including preservation of trade secrets and protection of child witness can justify restrictions on constitutional right of access).

In this case, Gardner's privacy interests were diminished by the formal criminal charges against him, by his resulting guilty plea, and by the search warrant affidavit disclosures previously made in other jurisdictions. In Judge Korman's view, the privacy interests of others were not diminished by these events, and thus the order appealed from affords continuing protection to them.

Petitioner thus faces a quandary. He cannot possibly argue that the lower courts did not adequately protect whatever remaining "legitimate privacy interests" he had in the search warrant affidavit after his plea of guilty. Thus, he must attack the system of judicial balancing itself—the very process crafted over a generation of this Court's decisions for determining whether public access is warranted. That balancing process, properly undertaken in this case, does not warrant reexamination by this Court.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT LLOYD RASKOPF
TOWNLEY & UPDIKE
405 Lexington Avenue
New York, New York 10174
(212) 973-6000
Counsel of Record

Of Counsel:

PAUL S. GROBMAN
CHRISTOPHER J. NOLAN
TOWNLEY & UPDIKE
405 Lexington Avenue
New York, New York 10174
(212) 973-6000

PHILIP E. KUCERA
NANCY E. RICHMAN
Times Mirror Company
780 Third Avenue
New York, New York 10017
(212) 418-9600